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VIA-HAND DELIVERY

SEP03'08 PM 1:31 NMB

Mary Johnson, General Counsel
National Mediation Board
1301 K Street, N.W.
Suite 250 East
Washington, D.C. 20005

Re: Public Comments on Representation Manual, 35 NMB 61

Dear Ms. Johnson:

The Association of Flight Attendants - CWA, AFL-CIO ("AFA-CWA"), the largest flight attendant Union in the world, submits it comments on the National Mediation Board's July 15, 2008 proposed revisions to its Representation Manual ("Manual"). In addition, AFA-CWA is in receipt of the comments submitted by the Transportation Trades Department ("TTD") on the Board's proposed changes and concurs with the views expressed therein. The comments of AFA-CWA on these proposed Board changes to its Manual follow:

Proposed Revisions:

Section 2.4 List of Potential Eligible Voters and Signature Samples

The carrier's failure to provide a substantially accurate list of potential eligible voters may be considered interference with the NMB's election process and therefore grounds for setting aside the election.

AFA-CWA supports this revision to the Manual. It has become increasingly clear that carriers, in an effort to defeat their employees' desire for Union representation, routinely pack the Official Eligibility List with individuals they *know* are ineligible because those individuals have resigned, been terminated or retired.

Furthermore, once the List is submitted, carriers have refused to actively monitor and review the ongoing accuracy of the List. Because Unions are not provided with an *Excelsior* list, they are forced to expend resources trying to determine whether the individuals listed are, in fact, eligible. Although all carriers maintain computerized personnel records reflecting an employee's status, they do not affirmatively update the NMB with status changes unless prompted by the Unions' submission of their own list of ineligible voters. Carriers will then reluctantly confirm their

ineligibility. This revision will surely motivate carriers to actively monitor and update the Eligibility List during the election period, or face a re-run election.

Section 3.3 **Acceptance of Additional Authorizations/Deadline for Intervening**

The delivery of an applicable list and signature samples ends the opportunity for the applicant to supplement its authorization cards.

The investigator will not accept applications or additional authorization cares from intervenors after 4 p.m., Eastern Time, on the day an applicable list of potential eligible voters and signature samples are delivered.

AFA opposes this revision since it is contradictory on its face. On one hand, under the current Section 3.3, the Board will accept additional authorizations "until 4 p.m . . . on the day the Investigator receives the applicable list and signature samples." The proposed change to Section 3.3 appears to directly contradict that statement since the first sentence of the proposed change would allow the Board to suddenly cutoff acceptance of new cards at the moment the list is delivered, no matter what time of the day that occurs. In other words, if the proposed change is enacted, and a carrier delivers "an applicable list" at 10 a.m, then the Board could, under the proposed changes, refuse to accept additional cards after 10a.m., despite the 4 p.m deadline contained in the first sentence of Section 3.3. Whether that was the intent of the Board is irrelevant. As proposed, the second sentence is contradictory and must be either re-written or deleted.

Section 8.2 **Challenges and Objections**

All challenges or objections **will be resolved by** substantive evidence. **Examples of substantive evidence include, but are not limited to: official carrier records; payroll statements; human resources forms; and, sworn declarations attesting to specific facts. When considering eligibility of employee and personnel matters, substantial weight will be given to the carrier's evidence as it maintains the official records relating to benefits, salary, payroll records, and job descriptions. Unsupported allegations will not be considered.**

AFA objects to the Board's proposed changes to Section 8.2 since it gives the carrier's documents greater weight and veracity than the Union's documents. Second, while giving the carrier's evidence greater weight, it does not *require* the carrier to produce its business records in support of eligibility determinations. The Union would only support a change that requires the carrier to produce its regularly maintained business records to verify an employee's employment status. Under current practice, the Board has accepted sworn statements from personnel officials attesting to the employment status of employees without requiring that official to produce the

carrier's official employment records. Without producing the actual employment records, a carrier official's sworn statement attesting to an individual's eligibility is meaningless.

Section 9.2 Eligibility

All individuals working regularly **and continuously** in the craft of class on and after the cut-off date are eligible to vote in an NMB representation election. Employees may not vote in more than one election at the same time.

A trainee will be considered eligible if the Carrier provides substantive evidence that the individual is on the payroll, receives benefits, accrues seniority, and has performed work in the craft or class prior to the cut-off date. In the absence of demonstrated evidence of performance of work subject to the direction of the Carrier, accrual of seniority and receipt of pay and benefits will not be determinative of eligibility. Carriers should identify any trainees upon submission of the List of Potential eligible Voters.

AFA conditionally approves of this change so long as the Board's intent is to comply with existing case law that has interpreted the term "employee" under 45 U.S.C. § 151 Fifth of the Railway Labor Act, as only applying to those individuals who actually perform work in the craft or class prior to the cut-off date. For the flight attendant craft or class, completion of a flight attendant trainee's Initial Operating Experience ("IOE") before the cut-off date does not satisfy the statutory requirement of "work" in the craft or class, as that flight attendant is not considered a member of the minimum crew complement under Federal Air Regulations §121.434. If, on the other hand, the Board's intent is to treat completion of the IOE as having satisfied the "work" requirement, then AFA does not support this proposed change since it would be contrary to existing law.

Section 9.205 Leave of Absence

Employees on authorized leaves of absence including military leave, leave for labor organization activities, or authorized sick leave **are eligible if they retain an employee-employer relationship and have a reasonable expectation of returning to work.**

AFA strongly opposes this proposed change as it gratuitously raises the threshold for eligibility for those persons on military leave, Union leave and sick leave by adding the requirement of having a "reasonable expectation of returning to work." The Board provides no rationale for adding this eligibility requirement, since its only effect will be to deny voting rights to individuals who are currently eligible.

Section 13.304-2 **Void Votes**

(5) votes for a current political candidate or other widely known individual, where it is clear that the voter does not intend for that individual to represent the craft or class for purposes of collective bargaining under the RLA.

The Board's proposed change in its treatment of void votes under Section 13.304-2 is simply contrary to the clear statutory provisions of the RLA. Specifically, under 45 U.S.C. § 152, Ninth, employees are permitted to vote for any "individual or organization" they choose. And under 45 U.S.C. § 152, Third, that individual or organization "need not be persons in the employ of the carrier." Thus, there is no limitation in the RLA on who may receive votes in a representation election.

Nor does there exists any statutory requirement that the Board must endeavor to divine whether the voter "does not intend for that individual to represent the craft or class" to allow a vote for representation to count. Notwithstanding the impossibility of divining a voter's true intent, the Board compounds the ambiguity of this provision by eliminating all "widely known individuals" as potential representatives. How does the Board define "widely known," and why is that fact significant in determining if an employee has cast a vote for representation? Some voters may believe that a "widely-known" labor leader would provide them excellent Union representation even though it is unlikely he/she would agree to do so.

If implemented, this change would place the Board in the untenable position of subjectively determining the legitimacy of individuals receiving votes for representation - a task it is statutorily prohibited from engaging in, and one it is wholly incapable of performing. The Board's only inquiry is to determine whether an eligible employee has cast a vote for representation - regardless of the identity of the individual receiving that vote.

Section 19.701 **Where there is a certified representative on one of the affected carriers but no certified representative on the other(s), the Board will exercise its discretion and extend the certification only where there is more than a substantial majority, as determined by the Board. Authorization cards may only be used to supplement the showing of interest necessary to trigger an election; they may not be used toward getting a certification extended. Nothing, however, in this Section precludes certification by check of authorizations as governed by Manual Section 7.0 or the opportunity for voluntary recognition.**

AFA-CWA strongly opposes the implementation of the new Section 19.701. This section creates new barriers to the extension of representation rights in a post-merger situation that are contrary to the Board's current practices and as well as the RLA's guarantee that a simple majority of employees may determine whether a craft or class will have Union representation.

Through this provision the Board has officially abandoned its long-settled practice of extending a certification in a merger based on the comparability in numbers of the carriers' respective employees. Now, the Board will only extend certification if the represented employees constitute "more than a substantial majority." This new standard for extending certification rights does not exist as a legal standard in any other area of the law, precisely because of its crippling ambiguity. Given that a simple majority is 50% + 1, what constitutes a "substantial" one is not defined in the Board's proposed language; leaving the Board with unfettered discretion in making this determination - apparently on a case-by-case basis. The right to obtain representation rights is enshrined in the RLA and cannot be subject to the whims of a Board that may be unable to agree on what constitutes "more than a substantial majority."

Moreover, the timing of this new section is suspect in light of the NWA/Delta merger scheduled to be completed by the end of 2008. Since that merger involves a certified representative on one carrier, but not at the other, the Board's new merger proposal appears aimed at this particular transaction, and is designed to create obstacles to the continuation or extension of Union representation at the post-merger Delta.

In addition, this provision prohibits a Union from using valid authorization cards to extend certification after a merger at the same time it permits the use of authorization cards to obtain a voluntary recognition for new representation. How the Board can reconcile this disparate treatment of authorization cards as a method of obtaining representation rights is not explained. In fact, under this proposed change employees seeking representation outside of a merger are given greater rights under the RLA than those involved in a merger.

For these reasons, AFA-CWA urges the Board to abandon this proposed rule and retain its current practice of using "comparability" as the measure to determine whether a Union certification should be extended in lieu of an election.

Sincerely,

Edward J. Gilmartin
AFA-CWA General Counsel

EJG/KTL